damages. Thus only in the light of repudiation of the contract could the acceptance of the refund have its significance. We therefore dismiss the appellant's appeal. It now remains for us to deal with the respondent's cross-appeal.

The learned trial judge having held that the appellant was bound to compensate the respondent assessed the damages to be $35,500, i.e. the difference between the contract price ($49,500) and the price at which the shophouse was sold to a third party ($85,000). The learned judge also awarded interest at 8% from January 26, 1981, i.e. the date of judgment.

Counsel for the respondent submitted that the damages should be assessed with reference to the market value of the property as at the date of the trial, which according to the evidence of Mr. K. Pasupathy, chartered surveyor practising in Johore Bahru (PW3) and that of the managing director of the appellant (DW1) was $130,000. The effect of this submission is that the damages which should be awarded to the respondent ought to be $80,500 and not $35,500. With respect, we disagree with this submission.

Under sub-section (1) of section 74 of the Contract Act (Act 136), the party who suffered by the breach of a contract is entitled to receive from the defaulting party:

"compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it"

Under sub-section (2) no compensation is to be given "for any remote and indirect loss or damage sustained by reason of the breach".

In our judgment to measure the respondent's loss or damage with reference to the date of the trial is not only unrealistic but also outside the ambit of the rule relating to remoteness of damages. The respondent is only entitled to a sum of money which would compensate him for the loss which naturally arose from the breach. He sustained the loss only when he was deprived of the opportunity to buy the shophouse, and this surely occurred when the appellant sold the house to a third party and not subsequently. It was only on that date that he was to have the house sold to him but it was on that date the house was sold to someone else. Thus if he had to buy the house or another house as a substitute therefor on that date he would have to pay $85,000. In other words he had to find an extra $35,500 over and above the $49,500 contract price. That is the amount which could be regarded as naturally flowing from the breach by the appellant. In fact the law on the subject is already settled in that in the case of breach of contract assessment of damages has to be made as on the date of the breach. *Engell* v. *Fitch*[8] and *Lee Heng & Co.* v. *C. Melchers & Co.*[9]. As the learned trail judge correctly applied the principle counsel's submission must fail.

The next point in the cross-appeal is the question of interest. Counsel for the respondent submitted that interest ought to be awarded from the date of the breach and not from the date of judgment. We do not think that it is proper. Awarding interest is at discretion of the court and it is awarded because the party to whom the award is made is deprived of the use of money. On the date of the breach not only was it not established that the respondent was entitled to damages, but the amount of damages was also unascertained. That being the case, the respondent therefore could not be said to have suffered any deprivation of the use of the money. In fact he lost no money at all. What he lost was only the opportunity to acquire a shophouse at $49,500. We therefore think that the learned trial judge was correct in awarding the interest to commence from the date of the judgment until the date of satisfaction.

Finally we dismiss the appellant's appeal with costs and the respondent's cross-appeal also with costs.

Appeal dismissed.

Solicitors: *A. L. Looi; Yeow & Chin.*

HSU YIK CHAI v. HSU YAW TANG & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Salleh Abas F.J.) May 11 & June 16, 1982]
[Kuching – Federal Court Civil appeal No. 21 of 1982]

Probate and Administration – Will – Construction of – Intention of testator.

In this case the deceased had made a will in which he gave a piece of land in Kuching to his brothers, the respondents, and his wife "to take rightful possession so as to assist them towards the expenses of bringing up and educating my children until they became matured". The widow of the deceased left the children to be brought up by the respondents and she later left and lived with a man. The children were brought up by the respondents until they were grown up. The appellant was adopted by the 2nd

respondent and his wife but he subsequently left to live with his mother. The deceased's land was later transferred to the respondents. The appellant lodged a caveat against the lands but the learned judge dismissed his claim. The appellant appealed.

Held: (1) in this case the direction in the will to the respondents and the widow in bringing up and educating the children until they attained majority was a condition of the bequest of the property. The respondents had accepted the bequest and the condition imposed by the will. The deceased intended to create a conditional gift and the two respondents but not the widow had fulfilled the condition; the two respondents were therefore entitled to keep the land;

(2) the appellant could only claim the land if there was an intestacy when the estate would be distributed in accordance with the Chinese custom in Sarawak but as there was a will in this case the estate must be distributed in accordance with the terms of the will.

Cases referred to:–

(1) *Chan Bee Neo & Ors.* v. *Ee Siok Choo* [1947] S.C.R. 1.
(2) *Tay Sok Ann* v. *Tay Sok Hiong & Anor* [1955] S. C.R. 17.
(3) *Phiong Khon* v. *Chonh Chai Fah* [1970] 2 M.L.J. 114.
(4) *Tan Kui Lim & Anor* v. *Lai Sin Fah* [1980] 1 M. L.J. 222.
(5) *Perrin* v. *Morgan* [1943] A.C. 399, 420.

FEDERAL COURT.

W.T. Voon for the appellant.
S. Sahathevan for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is concerned with the construction of a will.

On March 20, 1953, Hsu Yaw Hee (deceased) made a will in Chinese. It was prepared by the secretary of the Teochew Association on the deceased's instructions and attested by two witnesses. Four days after executing the will deceased died. His main assets were a piece of land at Matang of some 9.60 acres estimated at $11,000 and insurance money of $5,000. His debts were stated to be $7,522.51. Under the will deceased appointed his wife (Sung Swee Im) and his two elder brothers, the two respondents (Hsu Yaw Tang and Hsu Kwang Thai) as executors. Deceased had one son and three daughters. His son, the appellant, Hsu Yik Chai was born on March 24, 1953, the very day deceased died. His three daughters are Hsu I Ling (born on April 19, 1947), Hsu Ee Ming (born on April 24, 1949) and Hsu Ee Hung (born in 1952). After the deceased's death his widow was too poor to look after her children, so they were brought up by the two respondents. After staying for a short period with the 1st respondent the widow left and lived with a man. The Hsu family resented her behaviour and irresponsibility and subsequently severed all connections with her.

When the appellant was 12 years old and Hsu Ee Ming 16 years of age they were legally adopted by the 2nd respondent and his wife Annie Wu on March 28, 1966 in accordance with the provisions of the Adoption Ordinance (Cap. 91). Hsu Ee Ming is now married. The appellant lived with the 2nd respondent until he was 16 years of age when he went to live with the 1st respondent until he was 26 years of age. He then left to live with his own mother. Hsu I Ling is also married. Hsu Ee Hung was adopted by the respondent's cousin. He married Lee Thian Hung and they now live in the United States of America.

Deceased was a Teochew. From time to time he sought financial assistance from the two respondents to develop his land at Matang. He was sick. He must have had a premonition that he would soon die, so he decided to make a will. At the time he also signed two documents acknowledging his debts to the respondents – $1,500/- to the 1st respondent and $5,000/- to the 2nd respondent.

Probate of the will was granted to the 1st respondent on March 27, 1953. The land at Matang was transmitted to the 1st respondent on February 10, 1965 vide instrument No. L788/65. On the same day by another instrument No. L789/65 the said land was transferred to the two respondents as owners. The said land was eventually partitioned into three parcels described as Lot 228, Lot 229 and Lot 230. On February 7, 1980 by an instrument No. L1348/80 Lot 228 and Lot 229 were transferred to the 1st respondent and Lot 230 to the 2nd Respondent. On June 13, 1980 the appellant lodged a caveat against the said three lots of land.

In 1957 the widow sued the 1st respondent in her capacity as executor of the deceased's estate for the sum of $5,000 being money from the insurance policy which she claimed to be entitled to under the term of the deceased's will. (Kuching High Court Civil Case No. C/50/57). The matter was eventually settled.

We now come to the will itself. The validity of the will was not in dispute. There are two English translations. The first one was accepted by

the Probate Officer who acted on it (see page 78 of the Appeal Record) by stamping it with the official seal. The second translation was by Datuk Amar Stephen Yong (see page 85 of the Appeal Record). The two translations are set out below. The first one reads:—

"I, Hsu Yaw Hee, testator of this Will, being ill for a long time, physically weak and feeble, *wish that*, in case of any unfortunate mishap occurs, myself-bought estate (O.T. No. 15677) situated at Matang Road, Kuching, *be given* to my 2nd brother Hsu Yaw Tang, 5th brother Quentin Hsu Kwang Tai and my wife Sung Swee Im, *to take rightful possession* so as to assist them towards the expenses of bringing up and educating my children *until they become matured.*

In the course of settling the said property, should there be any dissension, any measure agreed upon by two of the three persons concerned, will be final and can be put into effect.

Regarding my insured amount $5,000.00 with the American International Assurance Company Ltd., I wish it be given to the possession of my wife, Sung Swee Im."

The second translation by Datuk Amar Yong reads:—

"This Will is made by me, Hsu Yaw Hee, Owing to my long illness, my body is very weak. In the event of any unfortunate happening, I desire to give my garden situate at Matang Road (Land Lease No. 15677) including building and the crops to my second natural elder brother Hsu Yaw Tang, my fifth natural elder brother Hsu Kwang Tai and my wife Sung Swee Im, these three persons to take over and manage in order to assist my children for their maintenance and education until they are of age. In the course of managing the abovementioned property, if there should be differences of opinion, agreement of two out of the three shall resolve the issue and proceed therewith.

With regard to my life insurance with the American Insurance Company in the sum of $5,000.00 I will that it be given to my wife Sung Swee Im."

The leraned Judge has first to decide which of the two translations should be accepted and then to construe the will. To do so he has to ascertain th language of the will, read the words used and probe the intention of the testator from them. In ascertaining the intention he is concerned mainly with four distinct matters, viz (1) the words used by the testator to express his intention; (2) the meaning of these words in relation to the persons and things described; (3) the meaning of the words in relation to the disposition of property among the donees and (4) the effect of any relevant Chinese custom in Sarawak. In respect of the law of inheritance the Chinese customary law of succession on intestacy has long been recognised by the courts in Sarawak. See *Chan Bee Neo & Ors.* v. *Ee Siok Choo*[1] and *Tay Sok Ann* v. *Tay Sok Hiong & Anor.*[2] referred to by this court in *Phiong Khon* v. *Chonh Chai Fah*[3] and *Tan Kui Lim & Anor.* v. *Lai Sin Fah.*[4] An administrator of a person dying intestate may distribute the estate according to recognised law or custom whereas an executor of a will must distribute the estate according to the terms of the will. We cannot see how the learned Judge could make a declaration in favour of appellant in respect of the land in the light of the will, such a declaration could only be made if there was an intestacy when the estate would be distributed in accordance with the Chinese custom in Sarawak.

The learned Judge gave two reasons for accepting the first translation. One is that it was an official translation accepted by the Probate Officer endorsed with the official seal with the words "Translation of attached Chinese Will of Hsu Yaw Hee." The other is that Datuk Amar Stephen Yong's firm Yong & Co. acted for the widow in the civil suit mentioned earlier (Kuching High Court Civil Case No. C/56/57). In that case use was made of the first translation. Datuk Amar Stephen Yong whose firm acted for the widow cannot be said to be a disinterested party. It is not at all surprising that the learned Judge preferred the first translation. It would create a dangerous precedent if an advocate, however qualified he may be in the Chinese language, is allowed to introduce his own translation of a document in a case in which his firm is acting for one of the parties. Furthermore, as the learned Judge rightly pointed out, the first translation had not been challenged in a civil case mentioned earlier but was in fact relied on by the same firm which is now acting for the appellant. *Halsbury's* Laws of England, 3rd Edition, Volume 39, page 959, paragraph 1451 under the heading of Conclusiveness of Probate states as follows:—

"For the purpose of discovering what words the testator used, and what dispositions he made, the court of construction accepts the probate in the case of all English wills, as conclusively showing the state in which the will was at its execution, and containing the whole will to be construed."

The contention of the appellant is that by the will the testator intended to create a trust for the benefit of his children and his widow. The two respondents and the widow were named as trustees. According to the appellant the use of the words (emphasised) in the first translation such as "wish that ... be given ... to take rightful possession ... until they become matured" indicate the testator's intention was to create a trust and not

a gift absolute or even a conditional gift. The appellant suggested that the testator imposed upon the two respondents and the widow each with a personal obligation to look after and maintain his children till they attained majority as they were too young to fend for themselves. On the other hand, the respondents submitted the testator bequeathed the land to the respondents and the widow on condition that they maintained and educated his children until they attained majority. It is the contention of the respondents that they had fulfilled the conditions and more, and they were entitled to the land.

The purpose of construction is to give effect to the intention of the testator expressed in the words of the will. On that point we would only refer to what Lord Romer said in *Perrin* v. *Morgan*[5] at page 420 and also quoted by the learned Judge as follows:–

"My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said – ...".

There can be little doubt that when the testator made the will he had in his mind the welfare of his children and widow and that he had little assets and that he had to continue to rely on his brothers to keep his family together. On the construction of the will the direction to the respondents and the widow in bringing up and educating the children until they attained majority is clearly a condition of the bequest regardless of the sufficiency of the property to generate funds for the whole period. According to 2nd respondent the income of the sale of pepper for the first year was about $2,000/- But by 1954 the pepper vines had been destroyed by disease and there was no income from the land from that year onwards. The respondents had accepted the bequest and the condition imposed by the will which far exceeded the worth of the subject of the gift, that is, the land. They had to make financial sacrifice to look after the testator's children until they came of age. The testator has prescribed a period within which the condition must be performed. This has strictly been observed by the respondents. They had done all within their power to satisfy the wishes of the testator in bringing up the children and providing them with good education until they were over the age of majority.

The testator devised the land to the respondents and his widow to enable them to use the income from the land for the support of his children until they attained majority. If the income is not forthcoming the respondents and the widow or two of them would have to decide what to do with the land to obtain the necessary fund to support the children and the widow. They could sell the land and use the money for supporting and maintaining the children (which may not be enough for the whole period) or they could keep it by assuming responsibility for supporting and maintaining the children. The respondents chose the last alternative. The widow has proved to be irresponsible by leaving her children with the respondents after more than a year after the testator's death to live with a man. She was young at the time and entitled to live her own life. But, she was a widow with four children. She had forfeited her right having discarded the responsibility of bringing up her own children. It could be that the testator understood the widow and foresaw the possibility of her marrying again and leaving the children by providing that should there be any disagreement among them the decision of two would be sufficient.

The learned Judge had gone very carefully into the evidence. He posed the question whether the deceased had intended to create a trust or a conditional gift in favour of his two brothers and his widow. He came to the conclusion that the deceased intended to create a conditional gift and that the two respondents had fulfilled the condition but not the widow so the two respondents were entitled to keep the land. He referred to the evidence of the widow during cross-examination when she had the grace to say:–

"I concede that both the defendants were responsible for bringing up the four children following the death of my late husband ... I did not have any plan to bring any of the children to stay with me when I went to live with the man as I could not afford it."

The two respondents had borne the responsibilities of bringing up not only their own children but also their late younger brother's children. They had given them a home, supported them and provided them with a good education. With the property the testator entrusted to them the respondents would probably be able to maintain his children and his widow for a short period but certainly not for the period it took for appellant to

reach majority without having to make certain financial sacrifice. Yet, the appellant, instead of showing gratitude, chose to sue the respondents who are his uncles. In the last few years the price of land had shot up considerably and he felt that he was entitled to his natural father's property without considering how the respondents could support and maintain him and his sisters until they came of age. He was too young then. He is now old enough but not wise enough to understand human relationship and brotherly sacrifice on the part of uncles when his mother left him and his sisters to fend for themselves. His sisters were wiser.

For the above reasons, we would dimiss the appeal with costs. Deposit to the respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Yong & Co.; Battenberg & Talma.*

CHANG LIANG SANG & ORS. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Abdoolcader J.) June 21, 1982]
[Kuala Lumpur – Federal Court Criminal Appeal No. 5 of 1978]

Criminal Law and Procedure – Sentence – Offence of trafficking dangerous drug – Other than in most exceptional circumstances sentence of death should be imposed for conviction – Dangerous Drugs Act, 1952, s. 39B.

Dangerous Drugs – Trafficking – Sentencing policy Dangerous Drugs Act, 1952, s. 39B.

In this case the appellants had been convicted of the offence of trafficking 974 grammes of heroin. The evidence showed that they were involved in the sale of heroin and that they were part of an organized syndicate trafficking in dangerous drugs. They appealed against conviction and sentence.

Held: (1) the appeal against conviction must be dismissed as there was sufficient evidence to justify their conviction;

(2) other than in most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking in dangerous drugs, in order to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public.

Case referred to:

(1) *Loh Hock Seng* v. *Public Prosecutor* [1980] 2 M.L.J. 13.

FEDERAL COURT.

Mohamed Noor bin Haji Don for the 1st, 2nd and 3rd appellants.

Karpal Singh for the 4th appellant.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The appellants were charged with trafficking 974 grammes of heroin, an offence under section 39B (1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B (2) of the said Act.

The evidence against them showed that they were involved in the sale of heroin and that they were part of an organized syndicate trafficking in dangerous drugs. They were convicted and sentenced to death.

We dismissed their appeal against conviction as we were satisfied that there was sufficient evidence to justify their conviction.

We considered the appeal against sentence. In that respect we would like to stress that in drug trafficking cases very little allowance can be made for the circumstances of individual offenders. We had said enough in *Loh Hock Seng & Anor.* v. *Public Prosecutor*[1] and similar cases. A study of these cases indicates the strong concern of this court that as far as possible in this difficult area of sentencing there should be reasonable conformity in the sentences imposed in similar cases. Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public.

We dismissed their appeal against sentence.

Appeal dismissed.

Solicitors: *Radzi Sheikh Ahmad, Noor & Farid; Karpal Singh & Co.*